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EQUAL PROTECTION AND SCRUTINIZING SCRUTINY: THE SUPREME COURT'S DECISION IN *SESSIONS V. MORALES-SANTANA*

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INTRODUCTION

Does the conferral of U.S. citizenship on children born abroad to unmarried parents (and only one a U.S. citizen) hinge on whether the U.S.-citizen parent is the father or the mother? Prior to the Supreme Court's decision in *Sessions v. Morales-Santana*,[1] it was actually anyone's guess.[2] The Equal Protection Clause[3] generally requires equal treatment of both men and women,[4] but 8 U.S.C. § 1409(c) clearly treated them differently.[5] Section 1409(c) allowed unwed mothers to confer citizenship on any children born abroad as long as the mother had lived in the United States for a period of one year any time prior to the child's birth.[6] Fathers (wed or unwed), on the other hand, had to have lived ten years in the United States to confer citizenship on their children born abroad.[7] Despite the unequal treatment, the Ninth Circuit held that this gender differential was constitutional because it helped avoid "stateless children."[8] The Second Circuit disagreed.[9]

The primary reason for this circuit split was differing applications of the level of scrutiny. "Intermediate scrutiny," after all, simply raises the question: just how intermediate *is* intermediate?[10] The individual Justices on the Supreme Court have themselves wrestled with this issue and the circuits were left with little real

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[1] 137 S. Ct. 1678 (2017).

[2] *Compare* Morales-Santana v. Lynch, 804 F.3d 520, 524 (2d Cir. 2015) (holding such distinctions violate equal protection), *aff'd in part, rev'd in part sub nom.* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017), *with* United States v. Flores-Villar, 536 F.3d 990, 997 (9th Cir. 2008) (holding the distinction withstood an equal protection challenge), *aff'd by an equally divided court*, 564 U.S. 210 (2011); *see infra* Part I.

[3] U.S. CONST. amend. XIV, § 1.

[4] *Morales-Santana*, 137 S. Ct. at 1689.

[5] *Id.* at 1686; *see infra* Part II.

[6] *See infra* Part I.A.

[7] *See infra* Part I.A.

[8] United States v. Flores-Villar, 536 F.3d 990, 997 (9th Cir. 2008), *aff'd by an equally divided court*, 564 U.S. 210 (2011); *see infra* Part I.C.

[9] Morales-Santana v. Lynch, 804 F.3d 520, 524 (2d Cir. 2015), *aff'd in part, rev'd in part sub nom.* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017); *see infra* Part I.B.

[10] *Compare Morales-Santana*, 804 F.3d at 534 (requiring less discriminatory alternatives under intermediate scrutiny), *with Flores-Villar*, 536 F.3d at 996 (finding the means were not "perfect" but still substantially furthered governmental objectives to pass intermediate scrutiny); *see infra* Part II.B.

guidance.[11] And to complicate matters further, there was doubt whether intermediate scrutiny, vagaries and all, applied in the first place.[12] The government maintained in *Morales-Santana*, for example, that because § 1409 is born from Congress' plenary power over the naturalization of aliens, it should be given only rational basis review.[13]

The Supreme Court granted certiorari in *Morales-Santana* to resolve the confusion.[14] As to the equal protection issue, Justice Ginsburg in *Morales-Santana* pointed to a body of case law she herself has built (seemingly single-handedly) over nearly fifty years and reaffirmed the basic mandate to treat men and women equally.[15] With Justice Ginsburg writing, the Supreme Court held that the "gender-based differential" in § 1409 violated this basic mandate.[16] But as to the level of scrutiny, we are no closer to figuring out what intermediate scrutiny is than when it was invented in *Craig v. Boren*.[17]

This Note proceeds in Part I by providing background material on the equal protection issue, including an overview of the relevant statutes and cases. Part II then analyzes the constitutionality of the gender-based differential in light of these background materials and the Supreme Court's decision in *Morales-Santana*. Part II concludes the Supreme Court's decision is ultimately right—the gender-based differential violates equal protection and rational basis review is not warranted—but the opinion ultimately fails to call intermediate scrutiny what it is, which allows for future circuit splits and continued in-fighting on the Supreme Court. In other words, the circuit split was cured, but the *reason* for the circuit split was not.

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[11] *See* Nguyen v. INS, 533 U.S. 53, 81 (2001) (O'Connor, J., dissenting); *see infra* Part I.D.

[12] *Nguyen*, 533 U.S. at 61 (majority opinion).

[13] Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (internal quotation marks omitted))); *see* Brief for Petitioner at 14, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191), 2016 WL 4436132, at *14.

[14] *See Morales-Santana*, 137 S. Ct. at 1688.

[15] *See id.* at 1689–90 (citing Califano v. Goldfarb, 430 U.S. 199, 206–07 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636, 648–53 (1975); Frontiero v. Richardson, 411 U.S. 677, 688–91 (1973); and United States v. Virginia, 518 U.S. 515, 555–56 (1996), in which Justice Ginsburg participated as an advocate or, in the case of *Virginia*, the authoring Justice).

[16] *Morales-Santana*, 137 S. Ct. at 1686.

[17] 429 U.S. 190, 197 (1976); *see also id.* at 218 (Rehnquist, J., dissenting) (criticizing the adoption of a then-unknown "intermediate" level of scrutiny).

I. A RECURRING PROBLEM—THE CONSTITUTIONALITY OF § 1409

This Section tackles, in order, the citizenship statutes at issue in *Morales-Santana*, and then the three most important cases leading up to the Supreme Court's decision: the Second Circuit's decision below; the conflicting Ninth Circuit decision in *United States v. Flores-Villar*; and finally, the Supreme Court's decision in *Nguyen v. INS*.

A. 8 U.S.C. §§ 1401 and 1409—The Statutory Framework

The main rules for the acquisition of citizenship at birth are found in 8 U.S.C. § 1401.[18] Section 1401(a)(7) governs when a child is born abroad—that is, outside the United States—to a married couple, one of which is a United States citizen, the other an alien.[19] Citizenship passes under this rule only if the citizen parent was physically present in the United States for "ten years, at least five of which were after attaining the age of fourteen years" before the child's birth.[20]

Section 1409 incorporates this main rule, but applies when the parents are unmarried.[21] But §1409(c) creates an exception for unmarried mothers: an unmarried, citizen mother need only live *one* year in the United States before the birth of the child.[22] For unmarried, citizen *fathers*, the main rule—ten years of physical presence with five of those years after age fourteen—was still in place.[23] It was this differential that the Second Circuit dealt with in *Morales-Santana v. Lynch*.[24]

B. Morales-Santana v. Lynch—*The Decision Below*

The Second Circuit decided *Morales-Santana* in July of 2015[25] and created a circuit split with the Ninth Circuit's decision in *United States v. Flores-Villar*.[26] The Second Circuit in *Morales-Santana* held that the different physical-presence requirements of § 1409(c) violated equal protection.[27]

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[18] 8 U.S.C. § 1401 (1958). The 1958 edition of the U.S. Code was in effect at the time of Morales-Santana's birth.

[19] *Id.* § 1401(a)(7). This rule is now found in § 1401(g) in the 2012 edition of the U.S. Code.

[20] *Morales-Santana*, 137 S. Ct. at 1687 (The physical-presence requirement has since been reduced to "five years, two after age 14") (citing 8 U.S.C. § 1401(g) (2012)).

[21] 8 U.S.C. § 1409(a) (2012).

[22] *Id.* § 1409(c).

[23] *See id.* § 1409(a).

[24] 804 F.3d 520 (2d Cir. 2015), *aff'd in part, rev'd in part sub nom.* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

[25] *Id.*

[26] 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 564 U.S. 210 (2011).

[27] *Morales-Santana*, 804 F.3d at 524.

Luis Ramon Morales-Santana was born in the Dominican Republic in 1962 to a Dominican mother and a Puerto Rican father who had acquired U.S. citizenship through the Jones Act.[28] At the time of his birth, Morales-Santana's parents were not married.[29] Once his parents did marry, however, Morales-Santana became "what is statutorily described as 'legitimat[ed].'"[30] Morales-Santana was admitted to the United States in 1975, but was later placed in removal proceedings after several felony convictions.[31] Morales-Santana objected to the removal proceedings and argued he was a United States citizen through his father.[32]

Morales-Santana's father met the one-year requirement applicable to unwed citizen mothers, but did not satisfy the more stringent physical-presence requirement for fathers.[33] Morales-Santana argued the separate requirements for men and women was unlawful gender discrimination and that the government did not have a sufficiently important reason to discriminate in that way.[34] The Second Circuit agreed and held that the different physical-presence requirement of § 1409(c) did not pass constitutional muster,[35] notwithstanding the Ninth Circuit's decision in *United States v. Flores-Villar*.[36]

C. United States v. Flores-Villar—*The Circuit Split*

In *Flores-Villar*, the Ninth Circuit upheld the different physical-presence requirements for men and women.[37] That case concerned a challenge by Ruben Flores-Villar to the same federal statute, 8 U.S.C. § 1409, and under similar facts to *Morales-Santana*.[38] *Flores-Villar* was the first time the different physical-presence requirements were addressed.[39]

Flores-Villar was born in 1974 in Tijuana, Mexico.[40] His biological father was a United States citizen who was sixteen years old at the time of Flores-Villar's birth.[41] When Flores-Villar was two months old, he was brought to the United States for medical treatment by his father and his paternal grandmother, also a United States citizen.[42]

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[28] *Id.*; *see* Jones Act of Puerto Rico, 8 U.S.C. § 1402 (1917).
[29] *Morales-Santana*, 804 F.3d at 524.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 523.
[34] *Id.* at 527.
[35] *Id.* at 535; *see infra* Part II.
[36] United States v. Flores-Villar, 536 F.3d 990 (9th Cir. 2008), *aff'd by an equally divided court*, 564 U.S. 210 (2011).
[37] *Flores-Villar*, 536 F.3d at 993.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 994.
[41] *Id.*
[42] *Id.*

In 1997, Flores-Villar was convicted for the importation of marijuana and was convicted again several years later on two counts of illegal entry into the United States.[43] All in all, he was "removed from the United States pursuant to removal orders" on six separate occasions.[44] Then, in 2006, Flores-Villar was again found in the United States and was arrested for being a deported alien.[45] He argued that "he believed he was a United States citizen through his father."[46] His application for a Certificate of Citizenship, however, was denied because his father had not met § 1409's physical-presence requirement.[47] When Flores-Villar appealed his conviction for being a deported alien, the Ninth Circuit thus had to address the constitutionality of § 1409(c), which would have conferred citizenship on Flores-Villar through a mother, but not through his father, at the time of birth.[48]

The Ninth Circuit held that, despite the different treatment of men and women, § 1409(c) was constitutional.[49] It applied intermediate scrutiny[50] to the statute and found "avoiding stateless children is an important objective"[51] and that "relaxing the residence requirement for women" substantially furthered that objective.[52]

Statelessness is the lack of citizenship and poses many problems.[53] The court explained that "many countries confer citizenship based on bloodline (*jus sanguinis*) rather than, as the United States does, on place of birth (*jus soli*)."[54] Because of this, "children of U.S. citizen mothers" who are "illegitimate . . . are more likely to be 'stateless' at birth."[55] For example, if an "illegitimate child is born in a country that does not recognize citizenship by *jus soli* (citizenship determined by place of birth)

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* ("[I]t was physically impossible for his father, who was sixteen when Flores-Villar was born, to have been present in the United States for five years after his fourteenth birthday as required by [the statute].").

[48] *Id.* at 993.

[49] *Id.*

[50] *Id.* at 996.

[51] *Id.* ("Avoiding statelessness, and assuring a link between an unwed citizen father, and this country, to a child born out of wedlock abroad who is to be a citizen, are important interests.").

[52] *Id.*; *see id.* at 997 ("[T]he residence differential is directly related to statelessness; the one-year period applicable to unwed citizen mothers seeks to insure that the child will have a nationality at birth."); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (stating intermediate scrutiny is satisfied "by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" (quoting Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980))).

[53] *Flores-Villar*, 536 F.3d at 996 ("[S]tatelessness is a deplored condition with potentially 'disastrous consequences.'" (quoting Trop v. Dullies, 356 U.S. 86, 102 (1958))); *see infra* Part II.A.3.

[54] *Flores-Villar*, 536 F.3d at 996.

[55] Runnett v. Shultz, 901 F.2d 782, 787 (9th Cir. 1990).

alone, the child can acquire no citizenship other than his mother's at birth."[56] But this is not always the case. In Iran, for example, an illegitimate child of Iranian parents is "regarded as having the father's nationality . . . ."[57] For the court, however, this one example was not enough to "diminish the strength of Congress' interest in trying to minimize the risk of statelessness *overall*."[58]

No one questioned that the goal of preventing stateless children was an important goal, but Flores-Villar argued whether "penalizing fathers" actually helped to achieve that goal.[59] The court conceded that "[t]hough the fit is not perfect, it is *sufficiently* persuasive."[60] But what helped to make the justification for the different statutory requirements "persuasive" was the "virtually plenary power that Congress has to legislate in the area of immigration and citizenship."[61]

In sum, both courts in *Morales-Santana* and *Flores-Villar* applied intermediate scrutiny but the latter mentioned in dicta that more deference was due to Congress because they were dealing with immigration and citizenship.[62]

D. Nguyen v. INS—*The Culprit*

The Ninth Circuit in *Flores-Villar* largely relied on a prior Supreme Court decision, *Nguyen v. INS*,[63] that dealt with the same citizenship statutes, though a separate "legitimation" provision of those statutes.[64] The facts of the case are similar to *Morales-Santana* and *Flores-Villar*. Tuan Anh Nguyen, the petitioner, was born

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[56] *Id.*

[57] *Flores-Villar*, 536 F.3d at 996.

[58] *Id.* (emphasis added) (noting also that, at any rate, "we do not expect statutory classifications always to be able to achieve the ultimate objective." (citing Nguyen v. INS, 533 U.S. 53, 70 (2001))).

[59] *Id.* at 997.

[60] *Id.* at 996. (emphasis added). Note the interesting use of "sufficiently persuasive" when, according to traditional intermediate scrutiny jurisprudence, the fit between means and ends is characterized as "*exceedingly* persuasive." United States v. Virginia, 518 U.S. 515, 531 (1996) (emphasis added). Of course, there has been some pushback against the "exceedingly persuasive" standard announced in *United States v. Virginia* and the Ninth Circuit cited *Nguyen* to show that "exceedingly persuasive" means nothing more or less than the standard requiring "important governmental objectives" and means that are "substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

[61] *Flores-Villar*, 536 F.3d at 996.

[62] *Id.* at 996–97; *see* Fiallo v. Bell, 430 U.S. 787, 792 (1977).

[63] 533 U.S. 53 (2001). The Supreme Court almost addressed the issue three Terms before *Nguyen* in *Miller v. Albright*, 523 U.S. 420 (1998), but the opinion did not command a majority of the Court. *Nguyen*, 533 U.S. at 56–58. Part of the problem was that two Justices "determined that the child, the only petitioner in *Miller*, lacked standing to raise the equal protection rights of his father." *Id.* at 58 (citing *Miller*, 523 U.S. at 445 (O'Connor, J., concurring)). Accordingly, Boulais, the father in *Nguyen*, remained in the case to ensure standing. *Id.*

[64] 8 U.S.C. § 1409(a)(4) (2012); *Nguyen*, 533 U.S. at 56.

in Vietnam in 1969.[65] His father, Joseph Boulais, was a citizen of the United States who was in Vietnam on work.[66] His mother was a Vietnamese citizen who had been in a relationship with Boulais, but the two were never married.[67] After his biological parents ended their relationship, Nguyen remained with his father in Vietnam and eventually came with him to the United States when he was almost six years old.[68] Nguyen lawfully became a resident of Texas and continued to be raised by his father, Boulais.[69]

In 1992, a twenty-two-year-old Nguyen pleaded guilty to two counts of sexual assault on a child.[70] He was sentenced to a total of sixteen years on both counts.[71] After three years, the United States Immigration and Naturalization Service (INS) sought deportation and initiated proceedings.[72] Nguyen testified during his deportation hearing that he was a United States citizen, but the immigration judge found him deportable.[73] Nguyen appealed and the argument was the same: the different requirement for mothers and fathers in § 1409(c) violated equal protection.[74]

The statutory provisions in *Nguyen* are related to those already addressed, but dealt with the separate requirement of legitimation, not physical presence in the United States.[75] Section 1409(a) sets forth the "requirements where the *father* is the citizen parent," and § 1409(c) governs where the *mother* is the citizen parent.[76] The requirement to legitimate a child born out of wedlock "under the law of the person's residence or domicile"[77] was only imposed on citizen fathers and formed the basis of Nguyen's and Boulais' equal protection claim.[78]

The Supreme Court, however, upheld the legitimation provision.[79] The majority began its analysis of the equal protection issue by making two observations.[80] First, an expectant citizen mother may reenter the United States in order to give birth, thereby securing citizenship for the child through the Fourteenth Amendment.[81] The

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[65] *Nguyen*, 533 U.S. at 57.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.* at 58.
[75] *See* 8 U.S.C. § 1409(a)(4)(A) (2012) (requiring that "the person [child] is legitimated under the law of the person's residence or domicile").
[76] *Nguyen*, 533 U.S. at 59 (emphasis added); *see also* 8 U.S.C. § 1409(a), (c).
[77] 8 U.S.C. § 1409(a)(4)(A).
[78] *See Nguyen*, 533 U.S. at 60.
[79] *Id.* at 73.
[80] *Id.* at 61.
[81] *Id.*; *see* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.").

court said that from this "perspective . . . the statute simply ensures equivalence between two expectant mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return."[82] Because the unmarried father generally has no control over where the child will be born, "[t]his equivalence is not a factor" for a citizen father.[83] Second, the statute "imposes no limitations on when an individual who qualifies under the statute can claim citizenship."[84] The majority conceded that § 1409(a) requires legitimation to occur before the child turns eighteen, but emphasized that if that condition is met, the child may claim citizenship at any time in those eighteen years.[85] These two practical observations were made before the heart of the Court's legal analysis, and by no means are dispositive of the issue, but did seem to factor into the court's subsequent reasoning.[86]

Beyond these practical observations, the Court found two important governmental interests that justified "the imposition of the requirement for a paternal relationship, but not a maternal one."[87] First, there was the interest "of assuring that a biological parent-child relationship exists."[88] Second, there was the interest "to ensure that the child and the citizen parent have some demonstrated opportunity or potential to develop . . . a relationship . . . that consists of the real, everyday ties that provide a connection between child and citizen parent and, in turn, the United States."[89]

One of the main arguments by the dissenting Justices was that these two interests were hypothesized by the Court, rather than affirmatively demonstrated by the government as is usually required under "heightened scrutiny."[90] The first interest of "assuring that a biological parent-child relationship exists" was apparently not relied on by the INS.[91] They instead asserted "two important interests: first, ensuring that children who are born abroad out of wedlock have, during their minority, attained a sufficiently recognized or formal relationship to their United States citizen parent . . . to justify the conferral of citizenship upon them; and

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[82] *Nguyen*, 533 U.S. at 61.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 61–62 ("A person born to a citizen parent of either gender may assert citizenship, assuming compliance with statutory preconditions, regardless of his or her age.").

[86] *See, e.g.*, *id.* at 70–71 (finding that the fact that "[t]he statute can be satisfied on the day of birth, or the next day, or for the next 18 years" was a "minimal" burden imposed by Congress and seemed to increase the "fit" between means and ends).

[87] *Id.* at 62.

[88] *Id.*

[89] *Id.* at 64–65.

[90] *Id.* at 78–79 (O'Connor, J., dissenting) (explaining the difference between rational basis and heightened scrutiny and disagreeing with the majority's failure in a "rigorous application of heightened scrutiny" when reviewing sex-based classifications). Note that Justice O'Connor refers only to "heightened scrutiny," not intermediate scrutiny. *Id.* The same tact is followed by Justice Ginsburg in *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1689–90, 1694, 1696 (2017).

[91] *Nguyen*, 533 U.S. at 79.

second, preventing such children from being stateless."[92] While hypothesizing possible interests served by statutory classification is allowed under rational basis, the dissent argued that "heightened scrutiny limits the realm of justification to demonstrable reality."[93]

Nonetheless, the majority found the interests, hypothesized or not, to be sufficiently important to justify the statutory classification.[94] The first interest of "assuring that a biological . . . relationship exists" was important because of the unique difference between men and women in relation to birth.[95] For the mother, the biological "relation is verifiable from the birth itself."[96] For the father, "the uncontestable fact is that he need not be present at the birth."[97] Because of the obvious difference between men and women when it comes to the birth of a child, the Court found that "[t]he imposition of a different set of rules . . . is neither surprising nor troublesome from a constitutional perspective."[98] Perhaps most interestingly, the Court said that to "require Congress to speak without reference to the gender of the parent . . . would be to insist on a hollow neutrality."[99] This is because, the majority reasoned, even a facially neutral rule "would sometimes require fathers to take additional affirmative steps."[100] Mothers would not need to take these "additional affirmative steps" because they are "always present at birth" and their "names will appear on the birth certificate," as well as have "witnesses to the birth to call upon."[101] So, in theory, the effect of the facially neutral rule would be same.[102]

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[92] Brief for Respondent at 11, Nguyen v. INS, 533 U.S. 53 (2000) (No. 99-2071), 2000 WL 1868100, at *11. The asserted interest of avoiding statelessness was not relevant to the legitimation provision of § 1409(a)(4) and the Court had "good reason to reject" it. *Nguyen*, 533 U.S. at 93 (O'Connor, J., dissenting). Apparently, the INS did assert the concern to justify the "relaxed residency requirements" of § 1409(c), discussed *infra* Part II.A, but that particular provision was not at issue in *Nguyen*.

[93] *Nguyen*, 533 U.S. at 77.

[94] *Id.* at 62.

[95] *Id. But see id.* at 79 (O'Connor, J., dissenting) (criticizing the majority opinion because it does not "elaborate on the importance of this interest, which presumably lies in preventing fraudulent conveyances of citizenship."). Supposedly, the majority took it as given that assuring a biological relationship protects against "fraudulent conveyances," but fails to discuss it further. Perhaps even more damaging in the dissent's eyes is the failure to show that it was "one of the *actual* purposes of § 1409(a)(4)." *Id.* (emphasis added).

[96] *Id.* at 62 (majority opinion).

[97] *Id.* (finding further that even "[i]f he is present . . . that circumstance is not incontrovertible proof of fatherhood." (citing Lehr v. Robertson, 463 U.S. 248, 260, n.16 (1983))).

[98] *Id.* at 63.

[99] *Id.* at 64.

[100] *Id.*

[101] *Id.*

[102] *See id.* ("Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction."). *But see id.* at 82–83 (O'Connor, J., dissenting) (explaining that "facially neutral laws that have a disparate impact are a different

The second justification for the disparate treatment was the (rather convoluted) interest of ensuring emotional ties between the child and parent and the United States.[103] At the outset, it should be noted that the dissent characterized this interest as both a "simultaneously watered-down and beefed-up version of [the] interest asserted by the INS."[104] But the majority reasoned that just as inherent, biological differences uniquely "prove" a woman as the mother, these biological differences also afford an opportunity to a woman to bond with a child that a man may not have.[105] "The mother knows that the child is in being and is hers and has an initial point of contact with him."[106] So, mothers at least have the *opportunity* to nurture a "real, meaningful relationship" with her child.[107]

In contrast, an unwed father does not always have the same opportunity.[108] With the "ease of travel" and general "willingness of Americans to visit foreign countries," men may have children abroad without even knowing "that a child was conceived."[109] The Court declared, "Principles of equal protection do not require Congress to ignore this reality."[110] Legitimation therefore provides fathers with some opportunity to first, learn of their children, and then, to potentially develop a relationship with them.[111] Again focusing on the inherent differences between men and women, the Court found nothing "unremarkable" in treating them differently in regards to their relationship with their children.[112]

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animal . . . than laws that specifically provide for disparate treatment."). Once again, the dissent demands a more searching, rigorous intermediate scrutiny. For the dissenting justices, the facially discriminatory law that specifically mentions, and treats differently, men and women is suspect. The majority's insistence on a "hollow neutrality" is not relevant to the analysis because there is entirely different case law on facially neutral laws that have a disparate impact. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 247–48 (1976) (holding that disparate impact alone is not enough to trigger heightened scrutiny).

[103] *Nguyen*, 533 U.S. at 64–65.

[104] *Id.* at 84 (O'Connor, J., dissenting) (finding it "watered-down" because it "emphasizes the 'opportunity or potential to develop' a relationship" as opposed to an "actual relationship" and "beefed-up" because "it goes past the formal relationship . . . desired by the INS to 'real, everyday ties.'"). At least it wasn't hypothesized.

[105] *See id.* at 65 (majority opinion).

[106] *Id.*

[107] *Id. But see id.* at 84 (O'Connor, J., dissenting) ("By focusing on 'opportunity' rather than reality, the majority presumably improves the chances of a sufficient means-end fit."). The dissent then argues that "in the absence of the fruition of an actual tie," how important can the interest really be? *Id.*

[108] *Id.* at 65 (majority opinion).

[109] *Id.* at 65–66. As women carry the child for months, it is not possible for them to be unaware in the same way.

[110] *Id.* at 66.

[111] *See id.* (describing the legitimation requirement as a "reasonable substitute" for the opportunity naturally and automatically given to the mother).

[112] *Id.*

As far as the means employed, the majority found that § 1409(a)(4) was "substantially related" to its goal.[113] First, it made sense for the bond to be established in the "formative years of the child's minority" because many other statutes concerning citizenship "require some act linking the child to the United States to occur before the child reaches 18 years of age."[114] Second, the Court addressed the argument made by petitioners that § 1409(a)(4) was "not effective."[115] The petitioners argued that just because a mother knows of the child, it "does not guarantee a relationship with one's child."[116] But the majority found it "almost axiomatic" that providing an "opportunity" for a meaningful relationship "has a close and substantial bearing on . . . the *actual* formation of that bond."[117] So, the fit between means and end was "exceedingly persuasive" for the majority and therefore justified the classification.[118]

In short, the Court found that "[b]ecause fathers and mothers are not similarly situated with regard to proof of biological parenthood, the imposition of different rules for each is neither surprising nor troublesome from a constitutional perspective."[119] The Court applied intermediate scrutiny to the legitimation provisions and left open the issue of whether a lesser degree of scrutiny should be used "because the statute implicates Congress' immigration and naturalization power."[120] Importantly, it was a five-to-four decision with the dissenting Justices applying a more rigorous intermediate scrutiny than the majority.[121]

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[113] *Id.* at 68.

[114] *Id.* at 68–69 (citing 8 U.S.C. §§ 1431–1432).

[115] *Id.* at 69.

[116] *Id.*; *see also id.* at 86–87 (O'Connor, J., dissenting) (suggesting "the idea that a mother's presence at birth," but not the father's, "supplies adequate assurance of an opportunity to develop a relationship . . . would appear to rest only on an overbroad sex-based generalization.").

[117] *Id.* at 70 (majority opinion) (emphasis added).

[118] *Id.* (quoting the "exceedingly persuasive" language from *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

[119] *Id.* at 63. The Court grounded its reasoning in the enduring "[p]hysical differences between men and women," *Virginia*, 518 U.S. at 533, and went so far as to say that "[t]o fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial." *Nguyen*, 533 U.S. at 73.

[120] *Nguyen*, 533 U.S. at 61 (citation omitted).

[121] *See id.* at 74 (O'Connor, J., dissenting). *Compare id.* at 86 (arguing there were "available sex-neutral alternatives" that would eliminate any need to speak explicitly in terms of sex), *and id.* at 88 (rejecting arguments of "administrative convenience" to "justify sex-based classifications"), *with id.* at 70 (majority opinion) (stating "[n]one of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance"), *and id.* at 69 (finding that Congress' use of an "easily administered scheme" instead of more demanding ones was not problematic).

II. *MORALES-SANTANA*—RIGHT RESULT, MESSY OPINION

By requiring men to have lived longer in the United States prior to a child's birth than unmarried women, the government has discriminated on the basis of gender. While this discrimination may make sense in the context of legitimation, it does not make sense in the context of physical presence in the United States prior to a child's birth. Assuming the interests identified in *Nguyen* are important, the shorter physical-presence requirement in § 1409(c) for unmarried women does very little to advance those interests. The Supreme Court in *Morales-Santana* correctly held as much,[122] but did not clear up the real source of confusion: what *is* intermediate scrutiny? The Court, however, did explain why rational basis is not the appropriate test, even when reviewing Congress' immigration power.[123]

A. Different Physical-Presence Requirements Do Not Substantially Further the Government's Objectives, Even Assuming the Objectives Are Important

Morales-Santana correctly distinguished the physical-presence requirements from the legitimation requirements at issue in *Nguyen*. Intermediate scrutiny requires the government to show "important governmental objectives" served by § 1409(c) and that the means—the shorter physical-presence requirement for unmarried mothers—are "substantially related to the achievement of those objectives."[124] The Court in *Nguyen* advanced two important governmental objectives for the legitimation requirements in § 1409: (1) assuring a biological parent-child relationship actually exists, and (2) ensuring an opportunity to develop a relationship that provides "a connection between child and citizen parent and, in turn, the United States."[125] An additional, third interest of avoiding statelessness was elaborated on in *Flores-Villar* and is addressed in this Note along with the other two objectives.[126]

1. Biological Parentage

"[T]he importance of assuring that a biological parent-child relationship exists"[127] cannot justify the different physical-presence requirements in § 1409(c). Physical presence in the United States has nothing to do with biological parentage. A father or mother can be biologically related to their child regardless of whether they have been physically present in the United States for one year, ten years, or no

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[122] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017).

[123] *See id.* at 1693–94.

[124] *Id.* at 1690 (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)) (internal quotation marks omitted).

[125] *Nguyen*, 533 U.S. at 64–65 (citation omitted).

[126] Avoiding statelessness was argued by the INS in *Nguyen*, but the Court found it irrelevant to the legitimation provisions at issue. See Brief for Respondent, *Nguyen*, *supra* note 92 and accompanying text.

[127] *Nguyen*, 533 U.S. at 62.

years at all. The interest did, however, make some sense in the context of the legitimation provisions of § 1409 in Nguyen. Those legitimation provisions required an unwed father to legitimate his child "under the law of the person's residence or domicile" before the child reached eighteen,[128] usually by marrying the mother or some formal recognition and support of the child.[129] Legitimation helps to ensure that derivate citizenship is demonstrably derived from an actual United States citizen and not merely a "fraudulent conveyance[]."[130] Therefore, through legitimating his child, a father proves to the United States that the child is, in fact, eligible for citizenship through a biological parent.[131]

This process is unnecessary for a mother because biological parentage for her is proven by the birth itself.[132] The father is in a different position—he need not even be present at the birth, and even if he is, it is not "incontrovertible proof of fatherhood."[133] This logic, however, simply does not apply to the separate physical-presence requirements. Indeed, the interest of assuring biological parentage was not argued by the government in *Morales-Santana*[134] nor addressed by the Court,[135] presumably for the reasons argued in this Note. Despite its importance in upholding § 1409's legitimation requirement in *Nguyen*,[136] the interest cannot justify the "gender-based differential" in the physical-presence requirements. In intermediate scrutiny parlance, even though the interest is "important," it is not "substantially related" to the differing physical-presence requirements for men and women.

2. Connection with the United States

The Court in Nguyen found ensuring "a connection between child and citizen parent and, in turn, the United States" was an important governmental interest.[137] The government presented a "novel argument" in Morales-Santana that the longer physical-presence requirement for fathers was needed to thus ensure "a connection between child . . . and the United States" because of the "'competing national

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[128] 8 U.S.C. § 1409(a)(4)(A) (2012).

[129] *See, e.g.*, Morales-Santana v. Lynch, 804 F.3d 520, 524 (2d Cir. 2015) (noting that Morales-Santana was legitimated through his parents' marriage after his birth), *aff'd in part, rev'd in part sub nom.* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017).

[130] *See Nguyen*, 533 U.S. at 79 (O'Connor, J., dissenting) (assuming the interest of having a biological relationship "lies in preventing fraudulent conveyances of citizenship" but criticizing the majority's failure to "elaborate on the importance of this interest.").

[131] *Id.* at 62 (majority opinion).

[132] *Id.*

[133] *Id.* (citing Lehr v. Robertson, 463 U.S. 248, 260 n.16 (1983)).

[134] *See* Brief for Petitioner at 18, 33, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191), 2016 WL 4436132, at *18, *33 (advancing only the other interests of ensuring a connection with the United States and avoiding statelessness).

[135] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1694 (2017).

[136] *Nguyen*, 533 U.S. at 62.

[137] *Id.* at 64–65.

influence' of the alien mother."[138] The mother is, according to the government, Parent No. 1 "at the time of childbirth" and an unwed father "enters the scene later, as a second parent."[139] Therefore, an unwed father needs a "longer physical connection to the United States" in order to offset the mother's—a.k.a. Parent No. 1—foreign allegiance.[140] The Court concluded that this argument was based on "the assumption that the alien father of a nonmarital child born abroad to a U.S.-citizen mother will not accept parental responsibility."[141] It further observed that the "assumption conforms to the long-held view that unwed fathers care little about, indeed are strangers to, their children" and concluded "[l]ump characterization of that kind . . . no longer pass[] equal protection inspection."[142]

In short, the government's justification for the "gender-based differential" in § 1409(c) ultimately results from an assumption about men and women: men sow their oats where they may, women are the ones left to make the oatmeal. Because this assumption does not relate to real biological differences,[143] it cannot justify the differential in § 1409(c).[144]

3. Statelessness

Finally, avoiding statelessness is an important objective, but it was not the actual purpose of the physical-presence requirements and, further, is not substantially furthered by the requirements. In order to understand the importance and relevance of this asserted interest, a brief overview of what it is and the many problems associated with it are in order.

"[S]tatelessness is a deplored condition with potentially 'disastrous consequences.'"[145] A stateless person is "a person who is not considered as a national

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[138] *Morales-Santana*, 137 S. Ct. at 1694–95 (quoting Brief for Petitioner at 9–10, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191), 2016 WL 4436132, at *9–10).

[139] *Id.* at 1695.

[140] *Id.*

[141] *Id.*; *see also id.* at 1693 n.13 (noting despite stereotypes, "unwed fathers assume responsibility for their children in numbers already large and notably increasing").

[142] *Id.* at 1695; *see also id.* at 1692 ("[I]f a 'statutory objective is to exclude or "protect" members of one gender' in reliance on 'fixed notions concerning [that gender's] roles and abilities,' the 'objective itself is illegitimate.'" (quoting Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982))). Interestingly, Justice O'Connor made this argument in *Nguyen*. *Nguyen*, 533 U.S. at 88–89. She argued "the goal of a 'real, practical relationship'" between child and parent "finds support not in biological differences but instead in a stereotype—*i.e.*, 'the generalization that mothers are significantly more likely than fathers . . . to develop caring relationships with their children.'" *Id.* (quoting Miller v. Albright, 523 U.S. 420, 482–83 (1998) (Breyer, J., dissenting)).

[143] *Nguyen*, 533 U.S. at 63; *see* United States v. Virginia, 518 U.S. 515, 533 (1996) ("Physical differences between men and women . . . are enduring.").

[144] *Morales-Santana*, 137 S. Ct. at 1695.

[145] United States v. Flores-Villar, 536 F.3d 990, 996 (9th Cir. 2008) (quoting Trop v. Dulles, 356 U.S. 86, 102 (1958)).

by any State under the operation of its law."[146] Thus, stateless people do not have the nationality of any country, being in a kind of citizenship-limbo.[147] "Some people are born stateless, but others become stateless."[148]

The problem of statelessness is especially damaging to children. Nearly three million children worldwide are stateless.[149] It is attributed mainly to discriminatory citizenship laws and the forced displacement of families caused by violent conflicts across the globe.[150] Statelessness brings many disadvantages with it; stateless children specifically suffer because of their uncertain future and are "highly vulnerable to exploitation, drugs and hopelessness and permanent disenfranchisement."[151] Stateless people often lack access to basic services like medical care, education, and employment.[152]

The Syrian refugee crisis is perhaps the most recent example of the problem of statelessness.[153] Families and individuals are forced to flee their homes quickly without time to grab any documentation needed to prove citizenship.[154] Without documentation, they "lack legal protections" in the countries they are forced to move to and "fear they may not be able to return home" when the conflict is over.[155]

This is all exacerbated by "discriminatory laws that deny citizenship on the basis of race, creed or gender."[156] In Syria, for example, women are incapable of conferring citizenship to their children on their own, thus rendering children without a father stateless.[157] This is the case even when "the child's father has died or cannot be found."[158] More than one million of the four million Syrian refugees in the neighboring countries of Lebanon, Jordan, and Turkey live in households without a father because he "was killed or chose to stay in Syria."[159]

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[146] *Ending Statelessness*, UNHCR: THE UN REFUGEE AGENCY, http://www.unhcr.org/en-us/stateless-people.html [https://perma.cc/TJ5P-LRB6].

[147] *Id.*

[148] *Id.*

[149] Michael Pizzi, *A Stateless Child Is Born Every 10 Minutes, UN Refugee Agency Says*, ALJAZEERA AMERICA (Nov. 3, 2015, 2:45 PM), http://america.aljazeera.com/articles/2015/11/3/unhcr-stateless-child-born-every-10-minutes.html [https://perma.cc/C5GN-5NFG].

[150] *Id.*

[151] *Id.*

[152] *Id.* ("In more than 30 countries, children who lack documentation of their citizenship cannot receive treatment at a health facility. In at least 20 countries, stateless children cannot receive vaccines. In others, including Cote d'Ivoire and Georgia, stateless children are not eligible for primary school or must pay a fee to attend school . . . .").

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* (naming discriminatory laws as the "biggest drivers" causing statelessness).

[157] *Id.* In addition to Syria, there are twenty-six other countries that do not allow citizenship to be passed down by the mother. *Id.*

[158] *Id.*

[159] *Id.*

There are some efforts for citizenship-law reform to address the "lack [of] safeguards . . . to grant nationality to children born stateless" in the countries with these discriminatory nationality laws.[160] But even in countries without such discriminatory laws, their "existing citizenship laws are simply ignored."[161] According to the United Nations High Commissioner for Refugees ("UNHCR"), "[w]hatever the cause, statelessness has serious consequences for people in almost every country and in all regions of the world."[162]

Statelessness is clearly an important interest, but the Court in *Morales-Santana* concluded that "there is little reason to believe that a statelessness concern prompted the diverse physical-presence requirements."[163] Further, the government was unable to show "that the risk of statelessness disproportionately endangered the children of unwed mothers."[164] Therefore, the problem with the statelessness argument was two-fold in *Morales-Santana*: first, the interest was "hypothesiz[ed] or invent[ed] . . . *post hoc* in response to litigation";[165] and second, the means did not "substantially relate" to the interest.[166]

As to being "hypothesized," the legislative history proved statelessness was *not* the object of § 1409. Initially enacted as part of the Nationality Act of 1940, "§ 1409 ended a century and a half of congressional silence on the citizenship of children born abroad to unwed parents."[167] And while statelessness concerns prompted "*other* sections of the 1940 Act," they were not a reason for § 1409.[168] As explained, § 1409 was prompted not by a concern for stateless children, but by assumptions about fathers' and mothers' relationships (or lack thereof) to their children.[169] Therefore, the "hypothesized" interest of statelessness could not justify the statute.[170]

By thus insisting that the proffered reason for the statute be the *actual* reason, the Court in *Morales-Santana* makes an important departure from *Nguyen*.[171] One of the dissenters' (which included Justice Ginsburg) primary criticisms in *Nguyen* was the majority's reliance on "hypothesized" interests in justifying the legitimation provisions of § 1409.[172] And not only did the majority rely on *the government's*

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[160] *Id.*

[161] *Id.* For example, in the Dominican Republic, people of Haitian descent are routinely denied citizenship even though their laws forbid racial discrimination. *Id.*

[162] *Ending Statelessness*, UNHCR: THE UN REFUGEE AGENCY, http://www.unhcr.org/en-us/stateless-people.html [https://perma.cc/TJ5P-LRB6].

[163] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1696 (2017).

[164] *Id.*

[165] *Id.* at 1697 (citation omitted) (internal quotation marks omitted).

[166] *Id.* at 1696.

[167] *Id.* at 1690.

[168] *Id.* at 1696.

[169] *Id.* at 1695; *see supra* Part II.A.2.

[170] *Morales-Santana*, 137 S. Ct. at 1696–97.

[171] *See supra* Part I.D.

[172] *See* Nguyen v. INS, 533 U.S. 53, 75 (2001) (O'Connor, J., dissenting) (noting "under heightened scrutiny, '[t]he burden of justification is demanding and it rests entirely on [the party defending the classification]'" and "a justification that sustains a sex-based

hypothesized interests,[173] it hypothesized *its own* interests to justify the statute.[174] Now, in *Morales-Santana*, no "hypothesized" interests—either from the government or the Court itself—will do under intermediate scrutiny.

Further, the government's interest (hypothesized or not) was not "substantially furthered" by relaxing the residency requirement for mothers and not fathers. The Court said that the government failed to do a "reality check" on the actual effects of the gender differential.[175] For example, it found that "the risk of parenting stateless children abroad was . . . and remains today, substantial for unmarried U.S. fathers, a risk perhaps *greater* than that for unmarried U.S. mothers."[176] Thus, "discrimination against *either mothers or fathers* in citizenship and nationality laws is a major cause of statelessness," and by focusing only on mothers, the government addressed merely part of the problem.[177] After this "reality check," the Court could not "countenance risk of statelessness as a reason to uphold, rather than strike out, differential treatment of unmarried women and men with regard to transmission of citizenship to their children."[178]

In sum, the government's asserted interests did not justify the "gender-based differential" in § 1409 because, even assuming they were "important," either the interests were "hypothesized" or the means chosen (e.g., different physical-presence requirements) did not "substantially relate" to the interests.

B. The Battle Over Intermediate Scrutiny Continues

The Court in *Morales-Santana* correctly decided the equal protection issue: none of the asserted interests could justify the different physical-presence requirements for mothers and fathers. And the Court articulated intermediate scrutiny more successfully than usual—there were only two justices who did not join the majority opinion.[179] Specifically, compared to *Nguyen*, *Morales-Santana*

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classification 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'" (quoting United States v. Virginia, 518 U.S. 515, 533 (1996))).

[173] *See id.* at 83–84.

[174] *See id.* at 79.

[175] *Morales-Santana*, 137 S. Ct. at 1697.

[176] *Id.* (emphasis added) (quoting Brief for Scholars on Statelessness as Amici Curiae Supporting Respondents at 9–10, Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (No. 15-1191), 2016 WL 5903236, *9–10).

[177] *Id.* (emphasis added).

[178] *Id.* at 1697–98.

[179] *See id.* at 1701 (Thomas, J., joined by Alito, J., concurring). Justices Thomas and Alito joined in the result, but refused to decide on the merits; they felt the Court was unable to grant the relief requested, e.g., the "conferral of citizenship on a basis other than that prescribed by Congress." *Id.* (quoting Nguyen v. INS, 533 U.S. 53, 73 (Scalia, J., concurring)). Because the Court also decided "conferral of citizenship" was not warranted in the case, *id.* at 1700 (majority opinion) (deciding to withhold, rather than extend, the favorable treatment), Justices Thomas and Alito joined the result only, *id.* at 1701–02 (Thomas, J., concurring).

was a success.[180] *Nguyen* was a close case, five to four, with a sharp disagreement over how to apply intermediate scrutiny.[181] *Morales-Santana* was nearly unanimous, six to two, with no dissenters—only two Justices who would not have reached the merits.[182]

Still, even though less divisive, *Morales-Santana* fails to clearly articulate what exactly intermediate scrutiny is. Getting to the result was easy enough, but the analysis contains all the old sources of confusion found in the Court's previous cases on intermediate scrutiny. This Note attempts to do what *Morales-Santana* did not: clearly mark where intermediate scrutiny lies between rational basis and strict scrutiny. It then addresses a related question: should rational basis be the test when reviewing § 1409, given Congress' broad immigration power? This Note sides with *Morales-Santana* that it should not.

1. How Intermediate Is Intermediate?

The formulation of intermediate scrutiny is easy enough: "To withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[183] But, as seen in the cases concerning § 1409, courts have had trouble with this seemingly "easy" test.[184] The test simply begs too many questions: first, what kinds of interests are "important"; and second, what exactly does "substantially relate" entail?[185]

Relevant to the first question is who carries the burden of proving an "important" governmental interest. In other words, Can an interest be "important" if the government does not advance it? The confusion about this question stems not from *Morales-Santana*, but from *Nguyen*.[186] As already explained, the majority in *Nguyen* relied on the interest of ensuring biological parentage to justify § 1409, an interest not asserted by the government.[187] This kind of "hypothesized" interest is fine under rational basis where it is "irrelevant [what] reasoning in fact underlay the legislative decision."[188] After *Nguyen*, it was unclear whether the actual reason for the "legislative decision" was similarly "irrelevant" under intermediate scrutiny.

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[180] *Compare id.* at 1685 (deciding the case six to two), *with Nguyen*, 533 U.S. at 55 (deciding the case five to four).

[181] *See supra* Part I.D.

[182] *Morales-Santana*, 137 S. Ct. at 1701–02 (Thomas, J., concurring).

[183] Craig v. Boren, 429 U.S. 190, 197 (1976).

[184] *See supra* Part I.B–D.

[185] *See Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting) ("Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation . . . .").

[186] *See* Nguyen v. INS, 533 U.S. 53, 79 (2001) (O'Connor, J., dissenting).

[187] *Id.*

[188] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).

More problematic was the confusion over what "substantially related" means. In fact, the circuit split between the Second and Ninth Circuits can be boiled down to a single concept—a less-discriminatory means analysis.[189] The Second Circuit found the existence of "effective gender-neutral alternatives" was reason enough to strike down § 1409(c).[190] The problem with that is "gender-neutral alternatives" were *not* required by the majority in *Nguyen*.[191] It was the *dissent* that said "the availability of sex-neutral alternatives to a sex-based classification is often highly probative of the validity of the classification."[192] True, there had been some cases that had invalidated laws based on the existence of gender-neutral alternatives,[193] but as noted by the dissent itself, the possibility of neutral alternatives was only "*probative* of the validity of the classification," not dispositive.[194] In short, the circuit split resulted from mixed signals from the Supreme Court about what "important" and "substantially relate" means.

And these questions are hard enough. But to muddy the waters further is the constant attempt to reformulate the applicable standard.[195] The standard was made from whole cloth to begin with,[196] but since then, both sides of the political spectrum have disliked it.[197] Indeed, Justice Ginsburg in *Morales-Santana* refuses to even call intermediate scrutiny what it is, instead substituting it with "heightened review" or

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[189] *Compare* Morales-Santana v. Lynch, 804 F.3d 520, 534 (2d Cir. 2015) (striking down § 1409(c) because of "the availability of effective gender-neutral alternatives"), *aff'd in part, rev'd in part sub nom.* Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017), *with* United States v. Flores-Villar, 536 F.3d 990, 996–97 (9th Cir. 2008) ("Though the fit is not perfect, it is sufficiently persuasive . . . ."), *aff'd by an equally divided court*, 564 U.S. 210 (2011) (per curiam).

[190] *Morales-Santana*, 804 F.3d at 534.

[191] *Nguyen*, 533 U.S. at 64.

[192] *Id.* at 78 (O'Connor, J., dissenting) (citation omitted); *see also id.* at 82 ("[T]he existence of comparable or superior sex-neutral alternatives has been a powerful reason to reject a sex-based classification.").

[193] *See id.* at 78 (first citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980); then citing Orr v. Orr, 440 U.S. 268, 281 (1979); then citing Weinberger v. Weisenfeld, 420 U.S. 636, 653 (1975)).

[194] *Id.* (emphasis added).

[195] *See* United States v. Virginia, 518 U.S. 515, 531 (1996); *see also* Ryan Lozar & Tahmineh Maloney, *Constitutional Law Chapter: Equal Protection*, 3 GEO. J. GENDER & L. 141, 161 (2002) (explaining in *Virginia*, "the Supreme Court placed a new emphasis on the need for an 'exceedingly persuasive justification' . . . arguably set[ting] forth a new level of heightened scrutiny").

[196] *See* Craig v. Boren, 429 U.S. 190, 197 (1976); *see id.* at 220 (Rehnquist, J., dissenting) (stating the new intermediate scrutiny standard "apparently comes out of thin air.").

[197] *Compare Virginia*, 518 U.S. at 579 (Scalia, J., dissenting) (criticizing the "liberal" majority for elevating intermediate scrutiny to strict scrutiny), *with Nguyen*, 533 U.S. at 75 (O'Connor, J., dissenting) (criticizing the "conservative" majority for downgrading intermediate scrutiny to rational basis). *See generally* Lozar & Maloney, *supra* note 195, at 161–66 (discussing the evolution of intermediate scrutiny).

"exacting standard."[198] Intermediate scrutiny has always been more of a political battle, trying to infuse the legal framework with a value judgment—specifically, we should hate gender discrimination just as much as racial discrimination. Intermediate scrutiny has been an odd exercise in arbitrarily creating a new tier of review[199] and then later refusing to acknowledge that tier.[200]

In this way, intermediate scrutiny is the orphan no one wants among the tiered levels of review. The tiered system of review has its origin in the case of *United States v. Carolene Products Co.*[201] In footnote four of that opinion, the Court lists *two* levels of review—rational basis for most laws and a "more searching judicial inquiry" when laws display "prejudice against discrete and insular minorities."[202] Rational-basis review presumes laws are valid; it requires means that are "rationally related" to a "legitimate" end.[203] Any legitimate end will do—it need not be the actual reason behind the law.[204] And "rationally related" is also a low bar; means are "rationally related" to their objectives if it is at least "debatable" that the means could *theoretically* work.[205] On the other extreme, strict scrutiny requires means that are "narrowly tailored" to "compelling" ends, that is, the means must actually work.[206] And not only must they work, "narrowly tailored" requires that the means be necessary—there must not be any less discriminatory alternative that would achieve the same "compelling" interest.[207] Further, the "compelling" nature of the ends must be demonstrated by the government, not hypothesized by the courts.[208]

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[198] Sessions v. Morales-Santana, 137 S. Ct. 1678 *passim*. *See also* Melanie K. Morris, *Ruth Bader Ginsburg and Gender Equality: A Reassessment of Her Contribution*, 9 CARDOZO WOMEN'S L.J. 1, 5 (2003) (noting Justice Ginsburg's "endorsement of the application of strict scrutiny [to gender classifications] is unambiguous"). Justice O'Connor helped set the precedent of calling intermediate scrutiny by some more menacing term. *See Nguyen*, 533 U.S. at 75 (O'Connor, J., dissenting) (using "heightened scrutiny" and never "intermediate scrutiny" to name the applicable standard); *see supra* note 90 and accompanying text.

[199] *Craig*, 429 U.S. at 197.

[200] *Morales-Santana*, 137 S. Ct. 1678, *passim*.

[201] 304 U.S. 144, 152 n.4 (1938); *see* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 552 (4th ed. 2011).

[202] *Carolene Products*, 304 U.S. at 152 n.4.

[203] *See* Lozar & Maloney, *supra* note 195, at 148.

[204] *Id.* (noting courts can "speculate as to what legitimate governmental interest could have conceivably motivated the state action.").

[205] Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 463–64 (1981) (allowing for a "*theoretical* connection" between ends and means even though the empirical evidence showed the means undermined, rather than advanced, the stated objective).

[206] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419–20 (2013).

[207] *Id.* at 2420 ("Although '[n]arrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,' strict scrutiny does require a court to examine with care . . . 'workable race-neutral alternatives.'" (quoting Grutter v. Bollinger, 539 U.S. 306, 339–40 (2003)).

[208] *Id.* at 2419.

The best way to understand intermediate scrutiny is to measure it in relation to these two extremes.[209] Rather than forcing it into one of the other boxes, either by calling it "heightened scrutiny" and blurring the line between it and strict scrutiny,[210] or treating it identically to rational basis,[211] the Supreme Court should focus on setting intermediate scrutiny's "intermediate" contours. By synthesizing the cases concerning § 1409, such contour-setting is possible.

As to the first question listed above, *Morales-Santana* shows "important governmental objectives" must be proven by the government, as in strict scrutiny.[212] The burden is demanding: "[i]t will not do to 'hypothesiz[e] or inven[t]' governmental purposes for gender classifications '*post hoc* in response to litigation.'"[213] The Court's opinion in *Nguyen* was merely an aberration in this regard.[214]

Second, the "substantially related" prong requires that the chosen means actually work, but there is no need to analyze gender-neutral alternatives that would also work.[215] When the means relate to real physical differences between men and women, it is more likely to pass intermediate scrutiny.[216] If, however, the means chosen result from stereotypes about "the way men and women are," without proof of biological differences, it is unlikely the means will "substantially relate" to important purposes.[217] The Court in *Morales-Santana* incorrectly characterizes these stereotypes as illegitimate government *purposes*.[218] It was incorrect to do so because the purpose of § 1409 is not to reinforce stereotypes; rather it was to ensure a connection between child and citizen parent as well as to prevent statelessness—interests that have already been recognized as "important."[219] The problem with requiring men to live longer in the United States before being able to confer citizenship on their children is not a problem with these purposes, but with the *means* chosen to accomplish the purposes.

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[209] *See* United States v. Virginia, 518 U.S. 515, 567 (Scalia, J., dissenting) ("These tests are no more scientific than their names suggest . . . .").

[210] *See id.* at 579–80; Morris, *supra* note 198, at 11.

[211] *See* Nguyen v. INS, 533 U.S. 53, 75 (O'Connor, J., dissenting); *supra* Part I.D.

[212] *See* Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690 (2017).

[213] *Id.* at 1696–97 (quoting *Virginia*, 518 U.S. at 533, 535–36).

[214] *See supra* Part II.A.3. There was at least one interest in *Nguyen* that was demonstrated by the government, but the Court clearly supplied its own interests as well. *See supra* Part I.D.

[215] *Nguyen*, 533 U.S. at 64 ("Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction."). *See also Virginia*, 518 U.S. at 573 (Scalia, J., dissenting) ("Intermediate scrutiny has never required a least-restrictive-means analysis, but only a 'substantial relation' between the classification and the state interests that it serves.").

[216] *See, e.g.*, *Nguyen*, 533 U.S. at 73 (holding the "difference between men and women in relation to the birth process" justified the gender distinction in § 1409).

[217] *Morales-Santana*, 137 S. Ct. at 1689–90; *see supra* Part II.A.2.

[218] *See Morales-Santana*, 137 S. Ct. at 1697.

[219] *See Nguyen*, 533 U.S. at 64–65; *supra* Part II.A.

Thus, intermediate scrutiny is like strict scrutiny in that the interests relied on to justify the classification cannot be "hypothesized or invented" after the fact. Intermediate scrutiny, however, is unlike strict scrutiny in that it does not require a less-discriminatory alternative analysis. It is more like rational basis in that regard. The fact that the means must relate to real physical differences between men and women, and not stereotypes, provides protection against discriminatory laws while still allowing the government to acknowledge our "most basic biological differences."[220] The "guarantee of equal protection" is more than "superficial."[221] "Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real."[222] The short of the matter is that the physical-presence provisions in § 1409 do not result from "basic biological differences" as the legitimation provision in *Nguyen* did. Instead, it results from "prejudices that are real"[223]—that men do not care about their children and women alone are meant to. The Equal Protection Clause protects against such arbitrary laws.

2. Rational-Basis Review Is Not Justified by Congress' Immigration and Naturalization Power

The gender-based distinction did not survive intermediate scrutiny, however formulated. The question remained in *Morales-Santana*, however, whether it should have only had to survive rational-basis scrutiny. Because the legitimation provision of § 1409 at issue in *Nguyen* was held to be constitutional even under intermediate scrutiny, the Supreme Court found it unnecessary to address whether rational-basis scrutiny, based on the "wide deference afforded to Congress in the exercise of its immigration and naturalization power," should be used.[224] But it stated that "these arguments would have to be considered" were the statute found to be unconstitutional.[225]

Accordingly, the *Morales-Santana* Court did consider these arguments. It found, however, the leading precedent to support it distinguishable from Morales-Santana's claim.[226] *Fiallo v. Bell*[227] applied rational-basis scrutiny to a section of the same act relating to the admission of aliens based off their relationship with a citizen parent.[228] Preference was given to aliens who asserted a relationship with a citizen

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[220] *Nguyen*, 533 U.S. at 73. *See also Virginia*, 518 U.S. at 533 ("Physical differences between men and women, however, are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'" (quoting Ballard v. United States, 329 U.S. 187, 193 (1946)).

[221] *Nguyen*, 533 U.S. at 73.

[222] *Id.*

[223] *Id.*

[224] *Id.* at 72–73 (citing Fiallo v. Bell, 430 U.S. 787, 792–93 & n.4 (1977)).

[225] *Id.* at 73.

[226] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1693–94 (2017) (distinguishing *Fiallo*, 430 U.S. at 792).

[227] 430 U.S. 787 (1977).

[228] *Fiallo*, 430 U.S. at 790–98.

mother over those who sought admission by virtue of their citizen father.[229] Rational-basis was justified because the Court emphasized that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the *admission* of aliens."[230] The government urged the Court to follow this precedent, but the Court distinguished it because Morales-Santana was not seeking *admission* into the United States but rather was arguing "he is, and since birth has been, a U.S. citizen."[231] So, while Congress has "'exceptionally broad power' to admit or exclude aliens," *Morales-Santana* did not involve "entry preference for aliens."[232] And "[e]xamining a claim of that order, the Court has not disclaimed . . . the application of an exacting standard of review."[233]

CONCLUSION

Since its inception, intermediate scrutiny has been more of a political battle than a real legal framework. This political battle is seen vividly in the procession of cases waging war on § 1409. On one hand, there are judges and Justices insisting that intermediate scrutiny is really no different than rational basis, and that this should be especially true when Congress' immigration power is implicated. On the other hand, there are those who argue that intermediate scrutiny is no different than strict scrutiny—after all, why should we hate gender discrimination less than racial discrimination? Intermediate scrutiny, however, is exactly what its name implies—something in between rational basis and strict scrutiny. Rather than developing an analytical framework for intermediate scrutiny that clearly sets its boundaries somewhere in the middle of two extremes, Justices of all ideologies have been more concerned with re-characterizing intermediate scrutiny and introducing ever more nebulous concepts into the supposed analytical framework. Intermediate scrutiny is an orphan that no one wanted, but it is now time to adopt her.

Morales-Santana is an important case. It resolved an issue that has been bubbling over for years and has visited the Supreme Court, in one way or another, multiple times. And it resolved the issue correctly: § 1409 is unconstitutional and the government cannot justify disparate treatment of men and women based on assumptions, not rooted in physical differences, about the way men and women are. But it fell short. It refused to call intermediate scrutiny what it is, blurred the line between ends and means, and ultimately has let the political battle wage on.

This Note attempts to synthesize the cases on § 1409 and provide a workable framework for intermediate scrutiny in the equal protection realm. Intermediate scrutiny, like all levels of scrutiny, is an ends-means balancing test. Under intermediate scrutiny, the ends must be "important." The interest cannot be

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[229] *See id.*

[230] *Id.* at 792 (emphasis added) (quoting Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).

[231] *Morales-Santana*, 137 S. Ct. at 1693–94.

[232] *Id.* at 1693.

[233] *Id*. (citation omitted).

"hypothetical" or "invented *post hoc* in response to litigation."[234] Instead, it must be the actual reason behind the statutory classification and this must be clearly demonstrated *by the government*. On the other side, the means must "substantially relate" to the asserted interest. The means chosen cannot result from overbroad assumptions about the way men and women are. But they do not have to be the least-discriminatory means possible, as in strict scrutiny. As long as the means relate to real physical differences, the means are likely to "substantially relate" to its objectives. In short, the means have to work, but they do not have to be the only ones that would.

This all may seem like black-letter law, but there has been substantial confusion over the appropriate test due to mixed signals by the Supreme Court. By more clearly setting intermediate scrutiny's contours and answering the question, Just how intermediate is intermediate? the Supreme Court can clear up the confusion and, at the same time, start offering real protection against gender discrimination.

[234] United States v. Virginia, 518 U.S. 515, 533 (1996).